

A **Iskandar bin Mohd Nuli v AmGeneral Insurance Bhd**
(previously known as AmG Insurance Bhd)

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO
02(f)-28-05 OF 2016(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), SURIYADI,
C RAMLY ALI, AZIAH ALI AND PRASAD ABRAHAM FCJJ
12 JULY 2017

Insurance — Motor insurance — Insurer's liability to satisfy judgment — Respondent issued motor insurance policy for Malaysian-registered car which excluded cover for passenger liability — Passenger in car injured when it met with an accident while being driven in Singapore — Passenger sued driver of car for negligence in Singapore High Court — Driver of car agreed to pay passenger substantial sum in damages in a consent judgment — Whether passenger could not enforce judgment against respondent but could only seek payment of judgment sum by Motor Insurers' Bureau of Singapore under its special agreement with insurance companies

F The owner of a Malaysian-registered car, which was covered by a motor insurance policy ('the policy') issued by the respondent, lent the car to the appellant to drive into Singapore with the appellant's wife ('Zuraini') as a passenger. Zuraini suffered injuries when the car was involved in a road accident with a crane truck in Singapore. Zuraini sued the appellant and the crane truck driver in the Singapore High Court for damages. The parties entered into a consent judgment under which the appellant agreed to pay
G Zuraini RM473,000 in damages plus costs and disbursements whilst the action against the crane truck driver was withdrawn. The respondent, meanwhile, applied to the High Court for a declaration that it was not liable to satisfy the consent judgment because the policy excluded passenger liability. The High Court, however, held that the respondent was liable under the policy. The
H Court of Appeal ('the COA') allowed the respondent's appeal and set aside the High Court's decision. Inter alia, one of the questions the appellant posed in the instant appeal against the COA's decision was whether pursuant to a 'special agreement' which insurance companies had with the Motor Insurers' Bureau of Singapore ('the Singapore MIB'), a Malaysian insurer was liable to satisfy
I a judgment obtained by a passenger-victim of an accident involving a Malaysian-registered vehicle in Singapore even though the motor insurance policy issued by the insurer did not cover for passenger liability.

Held, dismissing the appeal and affirming the decision of the Court of Appeal:

- (1) Pursuant to the special agreement, a Malaysian insurer was not liable to satisfy a judgment obtained by a passenger-victim of an accident involving a Malaysian-registered vehicle in Singapore even though the motor insurance policy issued by the Malaysian insurer did not cover for passenger liability (see paras 5(ii) & 13). A
- (2) The Court of Appeal did not commit any appealable error in coming to its findings. The proposition that the special agreement and its clauses incorporated themselves into the contract of insurance was the position in Singapore where the law required compulsory cover for passengers. The position of law in Malaysia, however, remained that the contract of insurance was the binding document between the parties and if liability was expressly excluded by the terms of the policy, the insurer was not liable. Hence, in the instant case, the terms of the special agreement did not incorporate itself into the contract of insurance but remained a special arrangement between the respondent and the Singapore MIB. To find otherwise would mean imposing liabilities on the respondent where no premiums were paid for by the insured. The rights and obligations of the respondent under the special agreement were between the respondent and the Singapore MIB and not with the insured per se (see paras 6–12). B
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- (3) Zuraini would be unable to enforce the consent judgment against the respondent as the policy issued did not include cover for passenger liability and no liability would ensue. Her only recourse was to rely on the special agreement and its terms, in particular cl 5, which stated that if in Singapore a judgment was obtained against any person in respect of a liability required to be insured by the compulsory insurance legislation and none of the insurers was liable to satisfy the same under cl 3 of the special agreement, the MIB would itself satisfy the same 28 days after the consent judgment became enforceable. As clearly amplified by cl 5, the special agreement was in essence an arrangement for enforceability of an unsatisfied judgment against the insurance company in a situation where the contract of insurance did not provide cover, as in the instant case (see paras 10–12). E
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[Bahasa Malaysia summary]

Pemilik kereta berdaftar Malaysia, yang mana dilindungi oleh polisi insurans dikeluarkan oleh responden, meminjamkan kereta tersebut kepada perayu untuk memandu masuk ke Singapura dengan isteri perayu ('Zuraini') sebagai penumpang. Zuraini mengalami kecederaan apabila kereta tersebut terlibat dalam kemalangan jalan raya dengan trak kren di Singapura. Zuraini menyaman perayu dan pemandu trak kren di Singapura untuk ganti rugi. Pihak-pihak memasuki penghakiman persetujuan di mana perayu bersetuju untuk membayar Zuraini ganti rugi sebanyak RM473,000 tambah kos dan pembayaran sementara tindakan terhadap pemandu trak kren ditarik balik. Responden, sementara itu, memohon kepada Mahkamah Tinggi untuk

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- A perisytiharan bahawa ia tidak bertanggungjawab untuk memenuhi penghakiman persetujuan kerana polisi mengecualikan liabiliti penumpang. Mahkamah Tinggi, walau bagaimanapun, memutuskan bahawa responden adalah bertanggungjawab di bawah polisi. Mahkamah Rayuan ('MR') membenarkan rayuan responden dan mengetepikan keputusan Mahkamah
- B Tinggi. Antara lain, salah satu daripada soalan perayu kemukakan di dalam rayuan ini terhadap keputusan MR adalah sama ada berikutan kepada 'special agreement' yang mana syarikat-syarikat insurans bersama dengan Motor Insurers' Bureau of Singapore ('MIB Singapura'), syarikat insurans Malaysia adalah bertanggungjawab untuk memenuhi penghakiman yang diperolehi
- C oleh mangsa penumpang kemalangan yang melibatkan kenderaan berdaftar Malaysia di Singapura walaupun polisi insurans motor yang dikeluarkan oleh syarikat insurans tidak melindungi untuk liabiliti penumpang.
- D **Diputuskan,** menolak rayuan dan mengesahkan keputusan Mahkamah Rayuan:
- (1) Berikutan kepada perjanjian khas itu, syarikat insurans Malaysia tidak bertanggungjawab untuk memenuhi penghakiman yang diperolehi oleh
- E mangsa penumpang kemalangan yang melibatkan kenderaan berdaftar Malaysia di Singapura walaupun polisi insurans dikeluarkan oleh syarikat insurans Malaysia tidak melindungi liabiliti penumpang (lihat perenggan 5(ii) & 13).
- (2) Mahkamah Rayuan tidak melakukan apa-apa kesilapan rayuan dalam mencapai keputusannya. Cadangan bahawa perjanjian khas dan
- F klausa-klausanya dimasukkan ke dalam kontrak insurans adalah kedudukan di Singapura di mana undang-undang mengkehendaki perlindungan wajib bagi penumpang-penumpang. Kedudukan undang-undang di Malaysia, walau bagaimanapun, kekal bahawa kontrak insurans adalah dokumen mengikat di antara pihak-pihak dan
- G jika liabiliti telah dikecualikan secara nyata oleh terma-terma polisi, syarikat insurans tidak bertanggungjawab. Maka, dalam kes ini, terma-terma perjanjian khas tidak dimasukkan ke dalam kontrak insurans tetapi kekal sebagai persetujuan khas di antara responden dan
- H MIB Singapura. Untuk mendapati sebaliknya akan bermaksud mengenakan liabiliti-liabiliti ke atas responden di mana tiada premium dibayar oleh pengambil insurans. Hak dan tanggungjawab responden di bawah perjanjian khas tersebut adalah di antara responden dan MIB Singapura dan bukan dengan pengambil insurans itu sendiri (lihat perenggan 6–12).
- I (3) Zuraini akan tidak dapat menguatkuasakan penghakiman persetujuan terhadap responden kerana polisi tersebut tidak memasukkan perlindungan bagi liabiliti penumpang dan tiada liabiliti akan berlaku. Satu-satunya jalan keluar adalah untuk bergantung ke atas perjanjian

khas dan terma-termannya, terutamanya klausa 5, yang mana menyatakan
 bahawa jika di Singapura, penghakiman diperolehi terhadap mana-mana
 orang berkaitan liabiliti yang dikehendaki untuk diinsuranskan oleh
 ‘compulsory insurance legislation’ dan tidak satupun daripada syarikat
 insurans bertanggungjawab untuk memenuhinya di bawah klausa 3
 perjanjian khas, MIB akan dengan sendirinya memenuhinya 28 hari
 selepas penghakiman persetujuan dikuatkuasakan. Seperti yang jelas
 dikuatkan oleh klausa 5, perjanjian persetujuan adalah pada dasarnya
 persetujuan untuk menguatkuasakan penghakiman yang tidak dipenuhi
 terhadap syarikat insurans dalam keadaan di mana kontrak insurans
 tidak memperuntukkan perlindungan, seperti dalam kes ini (lihat
 perenggan 10–12).]

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Notes

For cases on insurer’s liability to satisfy judgment, see 8(1) *Mallal’s Digest* (5th Ed, 2017 Reissue) paras 441–442.

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Cases referred to

Bankers and Traders Insurance Co Ltd v National Insurance Co Ltd [1985] 1 WLR 734, PC (refd)

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Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

New Zealand Insurance Co Ltd v Sinnadorai [1969] 1 MLJ 183, FC (refd)

Pacific & Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v Motor Insurers’ Bureau of Singapore [2013] 1 SLR 341, HC (refd)

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Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn Bhd [1987] 1 MLJ 217, SC (refd)

Appeal from: Civil Appeal No W-02(NCVC)(W)-2145–12 of 2014 (Court of Appeal, Putrajaya)

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Ariff Rozhan (William Lim and Johnson Lim with him) (Wajdi Mohamad Yusri & Co) for the appellant.

WSW Davidson (Rueben Mathiavararam, Lim Qi Si, Soh Jing Han, and Ng Peng Ying with him) (Suflan TH Liew & Partners) for the respondent.

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Prasad Abraham FCJ (delivering judgment of the court):

[1] We heard the submissions of parties on 9 March 2017, of this appeal based on the questions of law framed, and we reserved our decision to a date to be fixed. We now append below our decision and grounds for the same.

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[2] Background facts:

- A** (a) on 26 November 2010, the registered owner ('Sharul') of a motorcar bearing register No WIG 42225 ('the car') took out a motor insurance policy ('the policy') on the car with the respondent herein for the period 26 November 2010–25 November 2011 (see 'Ikatan Teras Bersama (Pengahakiman)', p 14);
- B** (b) on 13 December 2010, Sharul loaned the car to the appellant (Iskandar bin Mohd Nuli the second defendant in the High Court) to drive into Singapore with his wife ('Zuraini') as a passenger. The car was involved in a road traffic accident with a crane truck and Zuraini suffered injuries, loss and damage;
- C** (c) on 31 January 2013, Zuraini instituted an action for negligence in the High Court of Singapore ('the Singapore suit') against the appellant as driver of the car and also the driver of the crane truck;
- D** (d) the respondent was notified of the claim and instructed their Singapore solicitors Global Alliance Bhd ('GLA') to enter an appearance for the appellant;
- E** (e) on the 27 September 2013, GLA wrote to the appellant that the policy did not cover passenger liability (see 'Ikatan Teras Dokumen' Vol 2, pp 233–235).
The respondent also gave the appellant the option of appointing his own solicitors to take over the defence or for GLA to continue to defend the Singapore suit with all rights reserved. This was followed by two reminders dated 17 December 2013 and 20 December 2013;
- F** (f) on 31 December 2013, the appellant wrote to GLA asserting that by law and through contractual obligations with the respondent, the appellant was covered under the policy and was entitled to legal representation; and
- G** (g) meanwhile GLA continued to represent the appellant in the Singapore suit until 5 May 2015, when the solicitors appointed by the appellant took over the conduct of the appellant defence.
- H** [3] At the High Court, the respondent had sought for declaratory relief, amongst others, a declaration that the respondent is not liable to satisfy any judgment or part thereof obtained in Singapore by Zuraini against the appellant. On 28 November 2014 the High Court found that, under the motor insurance policy between the respondent and Sharul, the respondent is liable to satisfy and such judgment obtained by Zuraini. The respondent appealed to the Court of Appeal. On 16 December 2015 the Court of Appeal allowed the respondent's appeal and set aside the decision of the High Court.
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[4] The present status of the Singapore suit, on query made to counsel, was that the appellant and his wife Zuraini had on 12 May 2016 entered into a

consent judgment whereupon the appellant was to pay Zuraini damages in the sum of RM473,000 plus costs and disbursements. The action against the crane truck driver was withdrawn.

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THE PRESENT APPEAL

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[5] We deal first with questions (ii), (iii), (iv) and (vi) which are set out:

(ii) whether pursuant to the special agreement (together with its annexures), a Malaysian insurer is liable to satisfy a judgment obtained by a victim of an accident involving a Malaysian registered vehicle in Singapore, even though the motor insurance policy issued by the Malaysian insurer does not cover passenger liability?

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(iii) if question (ii) is answered in the affirmative, whether under the special agreement (together with its annexures), the Malaysian insurer is entitled to seek indemnity against the authorised driver of the Malaysian registered vehicle that was involved in the accident in Singapore?

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(iv) Whether the word 'you' in para 2 under the sub-heading 'AVOIDANCE OF CERTAIN TERMS AND RIGHTS OF RECOVERY' of section B of the motor insurance policy includes an 'authorised driver' of the vehicle, or only applies to the policy holder and/or insured as named in the motor insurance policy? and

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(vi) whether evidence of 'detriment' is necessary before the doctrine of estoppel can be invoked to estop the insurer from denying or repudiating its liability under the insurance policy, in view of the decision by the Malaysian Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331?

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[6] To determine the questions of law posed, before dealing with the special agreement together with the annexures, one must begin with the insurance policy between the insured Sharul and the respondent which governs the contractual relationship between them. It is not in dispute that the said policy does not cover passenger liability. The Federal Court in the case of *New Zealand Insurance Co Ltd v Sinnadorai* [1969] 1 MLJ 183 in particular the judgment of Ong Hock Thye CJ (as he then was) at p 185 para D left hand column to para I right hand column, opined:

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As s 80(1) refers specifically to 'judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy)' the provisions of such section necessarily assume first importance as a touchstone. The relevant portions of s 75 read as follows:

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In plain language this means that insurance cover is compulsory in respect of (a) all third parties other than passengers carried in the insured's vehicle and (b)

- A passengers carried by the insured, either for hire or reward, that is to say, in public service vehicles, or by reason or in pursuance of a contract of employment. Passengers in private vehicles consequently do not come within the ambit of compulsory insurance. Up to this point there is no difference of opinion between counsel on both sides. The real conflict is on the interpretation of the bracketed words in section 80(1), 'being a liability covered by the terms of the policy'. Is such liability to be construed as synonymous and exegetical of 'such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75'?
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- C Counsel for the appellants contends for the affirmative answer on the ground that 'being' means 'it being the case of', so that only where third party cover is compulsory can the passenger avail himself of the provisions of sub-section (1) of s 80 to claim direct payment from the insurer. In other words, the passenger in a private vehicle (such as the respondent) is disentitled from relying on the statutory rights conferred by the sub-section on third parties generally, but has to seek his remedy, in the usual manner, through subrogation to the rights of the insured against the insurers. This, of course, has the effect of enabling the insurers to invoke the arbitration clause in the policy, which is binding on the insured and equally so on any injured third party 'claiming through or under' the insured, so that a stay of proceedings may properly be sought under s 5 of the Arbitration Ordinance 1950.
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- E On the other hand, counsel for the respondent submits, as stated in her notice of cross-appeal that:

- F The learned judge should have held that if the insurance company does in fact issue a policy of insurance covering liability to passengers, although it may not be required to do so by virtue of proviso (ii) to section 75(1)(b) of the Road Traffic Ordinance, the third party, irrespective of whether he or she is a passenger or not, becomes entitled in his or her own right to recover from the insurers. If a liability is covered by the terms of the policy the plaintiff as a person entitled to the benefit of the judgment is entitled to sue the defendant.

- G *On this view, it is clear that the bracketed words result in extending the liability of insurers to make direct payment to third parties, beyond the scope of compulsory insurance, so as to include all others covered, even voluntarily, under the terms of the policy. As I understand it, counsel's argument is that those words should be construed, not as words of limitation — because then they would be wholly superfluous — but so as to give them a sensible meaning: ut res magis valeat quam pereat. Insurers having full freedom of contract, it is argued that they may insure passengers or not as they please: accordingly, where passengers are covered by the terms of the policy, there should be no valid reason why passengers voluntarily covered should be in a worse position than other passengers as to whom insurers have no option in giving cover.*
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- I *This argument is attractive and almost irresistible. However, I am unable to read the word 'being' as meaning 'or' so as to extend the scope of the insurers' liability. The power to do so rests only with Parliament.* The construction contended for, moreover, obliterates the distinction between the two broad categories of passengers in public service and private vehicles. In the result, proviso (ii) to s 75(1)(b) would be rendered nugatory, which fortifies my opinion that the respondent cannot avail herself of the provisions of s 80(1). This does not necessarily mean that the

respondent, being compelled to proceed by way of subrogation, cannot achieve her ends. There is only the risk that defences valid against the insured may defeat her claim, although in the instant case I doubt whether an alleged breach of condition 3 of the policy by the insured will be sustainable. An insured who died in the accident can hardly be expected to 'take all reasonable steps to safeguard the vehicle from loss or damage' or to see that the damaged vehicle was not left unattended and exposed to further risks. (Emphasis added.)

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[7] It is clear that passenger risk for Zuraini is excluded in this case. With amendments to the law in Singapore in the 1980s, which now requires compulsory cover for passengers, and with the voluminous flow of traffic between Malaysia and Singapore and the dichotomy of positions between Malaysia and Singapore with regards to the compulsory coverage for passengers risk, the insurance companies including the respondent came into a special arrangement with the Motor Insurers' Bureau of Singapore ('MIB') to seemingly address this anomaly.

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[8] It was an attempt by insurance companies to financially and morally as responsible corporate citizens to perform a crucial function in coming to arrangements to satisfy judgments obtained by victims where there was no effective insurance cover as in our instant case. The rights and obligations of the respondent under this special agreements are between the respondent and Singapore Motor Insurers' Bureau and not with the insured per se. The specific agreement and its annexures are found in ('Ikatan Teras Dokumen' Vol 2, p 182).

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[9] We refer particularly to cll 3, 4 and 5 of the same which clearly set out the scheme of how the special agreement works. The rights of the appellant lie against the Singapore MIB, if the consent judgment is not satisfied, then the Singapore MIB would satisfy the same and claim an indemnity from the respondent. In our view the terms of the special agreement did not incorporate itself into the contract of insurance but remains a special arrangement between the respondent and the Singapore MIB. We now set out in its entirety cl 3 of the special agreement.

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(3)(1) If a Judgment is obtained in Singapore against any person (hereinafter referred to as the 'Judgment Debtor'). *In respect of liability required to be insured by the Compulsory Insurance Legislation the Insurer Concerned will satisfy the Original Judgment Creditor if and to the extent that the Judgment has not been satisfied by the Judgment Debtor within twenty-eight days from the date upon which the person in whose favour it was given is entitled to enforce it.* (Emphasis added.)

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[10] We refer to the decision of the Singapore High Court in *Pacific & Orient Insurance Co Bhd (formerly known as Pacific & Orient Insurance Co Sdn Bhd) v Motor Insurers' Bureau of Singapore* [2013] 1 SLR 341 which was relied quite

A substantially by the appellant. This case must be looked at in the context of legislation that makes it compulsory for passenger cover. In our view, the propositions of law in this case with regards to the special agreement and its clauses incorporating itself into the contract of insurance is the position in Singapore whilst the position of law in Malaysia remains that the contract of insurance is the binding document between the parties. Further the operation of cl 3 of the special agreement, clearly envisages that the obligation is for Singapore MIB to settle the consent judgment 28 days after the consent judgment had become enforceable. Therefore, the special agreement remains in essence an arrangement for enforceability of an unsatisfied judgment against the insurance company in a situation where the contract of insurance does not provide cover as in our instant case. This is clearly amplified by cl 5 of the special agreement which we now set out:

D 5. If in Singapore a Judgment is obtained against any person in respect of a liability required to be insured by the Compulsory Insurance Legislation and none of the Insurers is liable to satisfy the same under Clause 3 hereof the Bureau will after the expiry of twenty-eight days from the date upon which the Original Judgment Creditor became entitled to enforce such Judgment against the Judgment Debtor itself satisfy the same.

E [11] To encapsulate, Zuraini would be unable to enforce the consent judgment she has obtained against the respondent as the policy issued does not include, cover for passenger liability and no liability would ensue. The extent to which an insurer under a motor insurance policy would be liable under the said policy was considered by the Privy Council when hearing an appeal from Malaysia in *Bankers and Traders Insurance Co Ltd v National Insurance Co Ltd* [1985] 1 WLR 734 wherein Their Lordships decided that an insurer could not be rendered liable in law for a liability which he had not agreed to insure under the terms of the policy. If the liability was expressly excluded by the terms of the policy the insurers were not liable. This proposition was adopted in the case of *Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn Bhd* [1987] 1 MLJ 217 and we refer to the judgment of CJ Borneo Lee Hin Hoe (as he then was) at p 220 para A–C right hand column refers and we quote and agree:

H In our view, the word ‘liability’ used in s 80(1) of the Ordinance means ‘liability covered by the term of the policy’. Moreover, the right of the third party to enforce a judgment given against an insured person is a right given to him by statute and not under the common law. As such the right of the third party is subject to the terms and conditions of the insurance policy. (See *Austin v Zurich General Accident and Liability Insurance Co Ltd*) and the relevant provisions of the statute, viz s 80 of the Ordinance). It is also important that s 80 of the Ordinance should be interpreted subject to s 10(1) and (2) of the Civil Law Act 1956 in order to bring it in harmony with the development of the law. (Emphasis added.)

I [12] As such, Zuraini’s only recourse is to rely on the special agreement and its terms ie the agreement between the respective insurance companies

including the respondent and the Singapore Motor Insurers Bureau and in particular cl 5. There was no question of the special agreement being interposed into the contract of insurance and to find otherwise would also mean imposing liabilities on the respondent where no premiums were paid for by the insured. We are therefore of the view that the Court of Appeal had committed no appealable error and we agree with their findings.

[13] On the upshot we would answer question (ii) in the negative. In the light of the above we do not need to deal specifically with the rest of the questions posed. As to question (vi) as that involves findings of fact as the question of law is a settled one, we decline to answer the same. The appeal is dismissed with costs of RM20,000 to the respondent subject to allocator and the order of the Court of Appeal is affirmed. Deposit to be refunded to the appellant.

Appeal dismissed and decision of the Court of Appeal affirmed.

Reported by Ashok Kumar

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